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Supreme Court of the United States

October Term, 1973
No. 73-194

BARBARA L. FUHRMAN, ADMINISTRATRIX OF THE ESTATE OF ARTHUR J. FUHRMAN, DECEASED, *et al.*,
Petitioners,

vs.

UNITED STATES STEEL CORPORATION,

and

DEN NORSKE AMERIKALINJE A/S,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION

COUNTER QUESTIONS PRESENTED

I. Where, as here, the Court of Appeals ruled that the psychiatrist's testimony, in the absence of a proper foundation, was inadmissible because he had been "consulted solely to gain qualification as a witness for the claimants," and where the claimants had ample opportunity to introduce competent evidence but elected not to do so, was that Court justified in declining to remand for a new trial and in entering judgment based upon all of the admissible proof?

II. Did the Court of Appeals properly determine the loss of future earning capacity in the death claims by considering the collective bargaining agreements and fringe benefits pertinent to the decedents rather than an unsubstantiated "analysis" by Petitioners already twice rejected by the District Court and the Court of Appeals?

COUNTER STATEMENT OF THE CASE

The Petitioners, as they did on the two prior occasions when they unsuccessfully attempted to secure a review by this Court, have again ignored the requirement of Rule 23(e) that a Petition for a Writ of Certiorari shall contain "a concise statement of the case containing the facts material to a consideration of the questions presented." As was the situation in connection with the second Petition for a Writ of Certiorari filed by these Claimants, the questions involved herein relate solely to the issue of *compensatory* damages. The alleged "facts" set forth in Claimants' "Statement of the Case" are taken from the decision of the District Court awarding punitive damages. These "facts" were found to be inaccurate by the Court below and it reversed the District Court (407 F.2d 1143, 6 Cir. 1969). This Court denied certiorari. *Fuhrman v. United States Steel Corporation,* 398 U.S. 958 (1970).

In advising this Court (Pet. p. 5) concerning the reversal by the Court of Appeals of the compensatory damage awards approved by the District Court, counsel for the Petitioners have neglected to mention that a Petition for a Writ of Certiorari was filed and that it was denied. The decision of the Court of Appeals is reported at 436 F.2d 1256 and the denial of the writ is reported at 402 U.S. 987 with the Petition for Rehearing denied at 403 U.S. 924.

The facts which are involved in the present petition relate: (1) to the excluded testimony of Dr. Dillon, the Petitioners' psychiatric witness; and (2) to the computation of pecuniary losses. The reasons for the rejection of Dr. Dillon's testimony and the contentions of Petitioners regarding computation of damages appear in the two opinions of the Court below (Appendix F, pp. A99-106, and Appendix K, pp. A195-198). Petitioners' Statement of the Case is fraught with inaccuracies and largely irrelevant.

This litigation arises out of the collision between the Steamship *Cedarville,* a Great Lakes bulk carrier, and Motor Vessel *Topdalsfjord* in the Straits of Mackinac on May 7, 1965, which resulted in the sinking of the *Cedarville* and deaths of ten of her crew members. From November 13, 1967, to November 7, 1968, hearings were held before court appointed commissioners to determine compensatory damages with respect to five death claims and seven personal injury claims. The District Court entered judgment in accordance with the Commissioners' report, awarding excessive damages both in the death cases and in the personal injury cases. On December 23, 1970, the United States Court of Appeals for the Sixth Circuit issued its opinion on these appeals under the title of *United States Steel Corporation and Den Norske Amerikalinje v. Alice Marie Lamp Admx., et al.* reported at 436 F.2d 1256 (1970). The Court held *inter alia,* that certain evidence admitted by the District Court was incompetent, that awards for pain and suffering, loss of life's pleasures, loss of earning capacity and other awards were unsupported by the record and clearly erroneous, and that present value was improperly computed. The Court therefore reversed the District Court's decision and remanded the case for re-evaluation and further findings on the basis of the record and the principles enunciated in the Court of Appeals opinion. No rehearing was requested.

Claimants filed Petitions for Writs of Certiorari with the United States Supreme Court. The Petitions were denied. *Fuhrman v. United States Steel Corp., et al.*, No. 1475, *cert. den.* 91 S. Ct. 1660 (1971) (5-17-71) (402 U.S. 987), *reh. den.* 91 S. Ct. 2227 (1971) (6-14-71) (403 U.S. 924); *Lamp v. United States Steel Corp., et al.*, No. 1370, *cert. den.* 91 S. Ct. 1649 (1971) (5-17-71) (402 U.S. 987), *reh. den.* 91 S. Ct. 2247 (1971) (6-21-71) (403 U.S. 940); *Cook v. United States Steel Corp., et al.*, No. 1497, *cert. den.* 91 S. Ct. 1665 (1971) (5-17-71) (402 U.S. 987).

Thereafter the claims of death claimants Lamp and Cook were settled for amounts computed in accordance with the decision of the Court of Appeals. This left unresolved only three death claims and seven personal injury claims.

On remand, the District Court ordered the Commissioners to recompute the remaining claims. On November 29, 1971, the Commissioners filed their recomputation of awards. However, after the shipowners protested what were later acknowledged to be numerous and obvious errors, the Commissioners filed on December 23, 1971, an Addendum of Correct Mathematical Errors in Original Recomputation of Awards. On March 24, 1972, the District Court accepted the Recomputation of Awards with the mathematical corrections, and on March 29, 1972, entered judgments in all pending cases.

Thereafter, the shipowners deposited with the Court the amount of the judgments for the death claims, which amount, by order of Court, has been invested in interest-bearing securities for the benefit of the three death claimants. The shipowners promptly filed Notice of Appeal in connection with the seven personal injury judgments. In addition, Notice of Appeal was filed by the seven personal injury claimants and the three death claimants.

On appeal, the Court of Appeals found that the personal injury awards were clearly erroneous, failed to comply with the guidelines mandated by that Court's earlier decision, and were unsupported by the record. The District Court was found to have improperly computed damages for pain and suffering, lost earning capacity and loss of life's pleasures, and to have incorrectly discounted future damages awards.

In those connections, the Court of Appeals referred to the following chart:

Earnings lost	0
Days lost from work for causally related complaints after June 3, 1965	14
Days of hospitalization	1
Surgery for causally related complaints	0
Number of claimants seeking medical treatment after June 1, 1965 (for claimed causally related complaints)	2
Number seeking psychiatric treatment	0
Total of medical and psychiatric expenses	0
Job advancements	5
Job demotions	0

(Appendix K, p. A203)

The Court found the District Court's failure to alter certain awards "inexplicable in view of our previous opinion . . ." (Appendix K, p. A203), and that the District Court's "failure to follow the mandate of this Court constitutes a flagrant disregard of its specific directions" (Appendix K, p. A204). The Court also observed that "to specifically instruct the District Court for the second time would seem to be of little value and, accordingly, we proceed to modify the awards entered on remand" (Appendix K, p. A206).

After modifying the awards consistent with its prior opinion, the Court entered judgment thereon. Even under the Court modification, these claimants received substantial awards, the personal injury claimants receiving from $24,659.00 to $67,476.00 and the two death claimants receiving from $139,276.00 to $191,055.00 (Pet. p. 6).

After entry of judgment by the Court of Appeals, one of the three death claimants and two of the personal injury claimants accepted the Court of Appeals decision and are no longer involved in this litigation. The remaining two death claimants and five personal injury claimants have filed the instant Petition for Writ of Certiorari. Since the Court of Appeals' most recent opinion served only to recompute awards in accordance with that Court's previous ruling, due to the District Court's "flagrant disregard of its direction," the present Petition merely restates contentions with reference to the Court of Appeals' 1970 decision, contentions regarding which this Court has previously denied certiorari.

ARGUMENT

I. This third attempt to secure a review by this Court should be denied. Certiorari should not be granted to "review evidence and discuss facts."

With grave constitutional questions and matters of national interest occupying the attention of this Court, certiorari should not be granted in order to give the defeated party another chance to attempt to demonstrate by an analysis of the facts that error has occurred.

In *United States v. Johnson,* 268 U.S. 220, at page 227, Mr. Justice Holmes, speaking for a unanimous Court, said:

> "* * * We do not grant certiorari to review evidence and discuss specific facts. * * *"

This Court's attitude in cases concerned with matters relating to evidence, whether it be its admissibility or sufficiency, is set forth in the concurring opinion of Mr. Justice Stewart in *Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107, 111 (1959), where he said:

> "Cases like this, I am firmly convinced, do not belong in this Court. To review individualized personal injury cases, in which the sole issue is sufficiency of the evidence, seems to me not only to disregard the Court's proper function, but also to deflect the Court's energies from the mass of important and difficult business properly here. All this has been elaborated *in extenso* by others, and there is no point in repeating or paraphrasing their words. Suffice it to note that I agree with what they have said. . ."

Petitioners, in an attempt to escape from this Court's clearly stated position on these matters, seek to secure a

review by urging the existence of a conflict between Circuits and a conflict between the decision below and a decision of this Court. That such conflicts do not exist will be demonstrated below. Stripped of such a conflict, there remains the basic question as to whether this Court should concern itself with the admissibility or non-admissibility of the testimony of a medical witness.

II. The matters raised by Petitioners were decided by the Court below in a prior decision and are now governed by that prior decision under the doctrine of law of the case.

Petitioners' argument is divided into two main parts, each of which is governed by the first decision of the Court below in *United States Steel Corporation and Den Norske Amerikalinje A/S v. Lamp, et al.*, 436 F.2d 1256 (1970), with respect to which this Court considered and denied three separate petitions for writ of certiorari and two separate petitions for rehearing.[1]

That decision is the law of this case and governs all subsequent proceedings. *United States of America v. U. S. Smelting Company*, 339 U.S. 186 (1950).

It is significant that nowhere in Petitioners' brief do they contend that the Commissioners and the District Court failed to follow the mandate of the Court below as set forth in its first decision and reaffirmed in its second decision.

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1. *Fuhrman v. United States Steel Corporation, et al.*, No. 1475, *cert. denied* 91 S. Ct. 1660 (1971) (5-17-71) (402 U.S. 987), *reh. denied* 91 S. Ct. 2227 (1971) (6-14-71) (403 U.S. 924); *Lamp v. United States Steel Corp., et al.*, No. 1370, *cert. denied* 91 S. Ct. 1649 (1971) (5-17-71) (402 U.S. 987), *reh. denied* 91 S. Ct. 2247 (1971) (6-21-71) (403 U.S. 940); *Cook v. United States Steel Corp., et al.*, No. 1497, *cert. denied* 91 S. Ct. 1665 (1971) (5-17-71) (402 U.S. 987).

II. The decision of the Court of Appeals:

(a) Does not conflict with this Court's decision in Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 2 L. Ed. 2d 953 (1958), and

(b) Does not conflict with decisions of other Circuits regarding testimonial evidence of a non-treating physician.

(a) *Byrd v. Blue Ridge is inapplicable.*

Before discussing the decisions upon which the Petitioners rely (Pet. pp. 8-10), it should be pointed out that all of them, including the *Byrd* case, were brought to the attention of this Court in their prior petition for a writ of certiorari and that *Byrd* was discussed, in detail, in their petition for a rehearing. The arguments advanced in the present Petition are simply a rehash of those which have already been considered by this Court (Petition for Writ of Certiorari; No. 1475, October Term 1970, pp. 17-21; Petition for Rehearing No. 1475, October Term 1970, p. 21).

The Court below was of the view that it was not required by *Byrd* to remand the case for a new trial to permit the claimants to introduce psychiatric testimony. Upon the remand, it had instructed the District Court "* * * to make * * * [s]uch further findings and re-evaluation * * * *on the basis only of the evidence herein held to have been properly received* and in accordance with the principles herein enumerated." 436 F.2d at 1272 (Appendix K, p. A195) (Emphasis supplied).

The power of the Court of Appeals to so rule is supported by numerous Supreme Court and Court of Appeals decisions (e.g., *United States v. Penn Foundry & Mfg. Co., Inc.*, 337 U.S. 198 (1949); *Clark v. Travelers Indemnity*

Company, 328 F.2d 819 (7th Cir. 1964); *Paul v. Archer-Daniels-Midland Company*, 313 F.2d 612 (8th Cir. 1963); *Mefford v. Gardner*, 383 F.2d 748 (6th Cir. 1967), and by statute. 28 U.S.C. § 2106 (1948) provides that:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, or may remand the case and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

The inapplicability of *Byrd* to the facts of the instant case was explained by Judge Peck, speaking for the court below (Appendix K, pp. A195-196):

> "Claimants argue that the rule of *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1968), requires that they be permitted to introduce new psychiatric evidence on the issue of the claimants' damages in the District Court.
>
> "We find no merit to the claimants' argument for several reasons. First, in *Byrd v. Blue Ridge, supra*, the petitioner sued in the District Court to recover for injuries allegedly caused by respondent's negligence. Respondent asserted as an affirmative defense that petitioner was respondent's employee for purposes of the State Workmen's Compensation Act and that the Act provided the exclusive remedy. After hearing the respondent's evidence on this issue, the trial judge struck the defense. In accordance with this ruling, the judge did not permit the petitioner to offer evidence on this issue. The Court of Appeals reversed as to the availability of the defense and, without a remand to receive evidence of the petitioner on the

issue, made its own determination on the record and directed a judgment for the respondent.

"The Supreme Court vacated the directed verdict and remanded to the District Court in order that the petitioner could present evidence in his favor on the issue. *The stated reason for the remand was that the petitioner's evidence although irrelevant under the view of the law taken by the District Court, became relevant and necessary under the corrected interpretation of the defense.*

"In the instant case, instead of excluding the testimony later found to be admissible, the District Court *admitted* evidence (the psychiatric testimony) which was later found inadmissible by this Court. *Thus, it is clearly distinguishable from the situation where a decision was rendered without the aid of relevant and necessary evidence, as occurred in Byrd. Here, a decision was rendered with the aid of evidence which should not have been before the trial court. The Byrd decision is simply inapposite.*" (Emphasis supplied)

Contrary to the circumstances presented in *Byrd,* Petitioners had ample opportunities to present competent evidence, but chose not to do so. Not only did the District Court's erroneous ruling have no bearing on claimants' prerogative to introduce evidence which Petitioners now contend they should be allowed to introduce on remand, but claimants were advised well in advance of the close of proofs in the initial District Court proceeding that the psychiatric testimony on which they relied might well be found, on appeal, to be incompetent and inadmissible. Under these circumstances, the rule of *Byrd v. Blue Ridge Rural Electric, Inc.,* is inapplicable.

(b) *The decision below does not conflict with the decisions of other Circuits.*

Petitioners have attempted to demonstrate that the exclusion of Dr. Dillon's testimony created a conflict between the decision below and case law in other Circuits. Such is not the case. The Court pointed out that his testimony had been excluded because of lack of proper foundation in as much as he was not a "treating psychiatrist" but had been consulted "solely to gain qualification as a witness for the claimants" and that he could not change his function to that of "treating psychiatrist" five years after the happening of the accident. Further, the Court stated that because the Cedarville had sunk on May 5, 1965, and its opinion in the prior appeal was filed on December 23, 1970, if another psychiatrist had been substituted for Dr. Dillon and his testimony had been offered as that of a "treating psychiatrist" it would have "been no more than a sham attempt at circumventing the holding that testimony of a non-treating psychiatrist is inadmissible" (Appendix K, p. A197).

If the Court of Appeals needed an additional reason for declining to order a retrial of the case it was afforded by the Petitioners themselves. The District Court, on remand, followed the instructions of the Court below with respect to the exclusion of the psychiatric testimony and declined to reopen the case for further proof. The claimants' proffer was virtually the same testimony of Dr. Dillon as had been presented at the original trial. The only difference was that in the proffer his answers and opinions were in response to hypothetical questions which were not supported by competent evidence in the record (Appendix K, p. A197).

Petitioners' argument that Dr. Dillon's testimony, in its original form, was admissible is contrary to the general

rule and is not supported by any of the cases cited and quoted from in the instant Petition. The general rule appears in *Grobelny v. W. T. Cowan*, 151 F.2d 810 (2 Cir. 1945) at 812:

> "The general rule is that self-serving statements are not admissible when made to a doctor who is not called to treat a party to a lawsuit as a patient but only to examine him to determine his condition without an attempt to treat or cure. There is then no incentive to speak truly in order to give the doctor a true basis for diagnosis to enable him to prescribe the proper medical treatment and there may be some inducement to distort facts for the purpose of a trial if one is in the offing."

The distinction between the admissibility of the testimony of the "treating" and the "non-treating" physician is set forth in the dissenting opinion in *Spillers v. Tri-State Glass Lined Storage, Inc.*, 325 F.2d 322 (7 Cir. 1963). There, Judge Schnackenberg said (p. 327):

> "It is settled law that, upon the trial of a personal injury case when a physician, other than an attending physician, is called to testify for plaintiff, he is not permitted to express an opinion based upon statements made by the plaintiff for the purpose of enabling the physician to testify in his behalf, while an attending physician, when called as a witness for plaintiff, may express a medical opinion based in part on statements made by his patient in connection with treatment, *Cleveland, C.C. & I. R. Co. v. Newell*, 104 Ind. 264, 270, 3 N.E. 836, 839 (1885), a physician who did not treat plaintiff for the injuries involved is limited to giving an answer to hypothetical questions put to him in court."

This rule applies to any medical expert, including an examining psychiatrist.

Petitioners' reference to and their argument concerning *Teti v. Firestone Tire & Rubber Co.*, 392 F.2d 294 (6 Cir. 1968) (Pet. p. 9), is self-defeating. There, the history given to the examining doctor only became admissible because the plaintiff had testified, under oath, concerning the same facts. In the instant case the claimants not only did not so testify but their testimony was contrary to the alleged histories given to their psychiatrist.

In referring to this marked variance, the Court below said (Appendix F, p. A100):

> *"Considering the credibility issue first, we find before us a record in which virtually all of the objective evidence is inconsistent with, if not diametrically opposed to the opinions which the psychiatric expert was permitted to place in the record.* These opinions are of a curiously similar pattern with reference to each of the personal injury claimants, almost always concluding that each seaman suffered indescribable horrors and has had his future life warped by a 'post-traumatic anxiety neurosis'—resulting from a half hour's immersion in the waters over which they traveled for a livelihood. *These opinions were based almost exclusively on interviews conducted for the purpose of preparing testimony for presentation to the Commissioners.* In many respects these expert opinions failed to take into account such circumstances as pre-accident complaints and medical treatment for some of the conditions thereafter existing, and in connection with the dire prognostications do not recognize post-accident promotions and actual increases in earnings, nor satisfactory home and occupational adjustments." (Emphasis supplied)

Kaufman v. Kaufman, 164 F.2d 519 (D.C. Cir. 1947) (Pet. p. 9) is likewise distinguishable. That case involved a divorce proceeding in which the testifying psychiatrist had obviously been consulted by both the husband and wife in connection with their marital difficulties. He was a treating physician and could, therefore, base his opinion upon information elicited from his patient.

There is nothing in *Reid v. Quebec Paper Sales & Transportation Co.*, 340 F.2d 34 (2d Cir. 1965) (Pet. p. 9), that suggests any conflict with the Court of Appeals decision here. The incompetency and inadmissibility of the testimony of claimants' psychiatric expert in these claims arose out of substantial discrepancies, variances and inconsistencies between the bases used by the expert for his opinion and the uncontroverted facts brought out by the claimants' own testimony and the uncontroverted documentary evidence. The *Reid* decision does not involve any such issue.

In *City-Wide Trucking Corp. v. Ford*, 306 F.2d 805 (D.C. Cir. 1962) (Pet. p. 10), one of the medical questions involved was the possibility of permanent residual effects resulting from the injury. The physician testified concerning a series of tests which he had conducted on the plaintiff. His prognosis was based, not upon subjective complaints, but upon "sufficient findings on an objective basis" (p. 810).

In *Spillers v. Tri-State Glass Lined Storage, Inc.*, 325 F.2d 322 (7 Cir. 1963) (Pet. p. 10), the Court stated the rationale for rejecting the opinions of non-treating physicians, when they are based upon the self-serving, unsupported and unsworn statements of the injured party. In *Spillers*, the plaintiff had already testified to the same matters upon which the doctor had based his opinion so the

doctor's testimony concerning the plaintiff's statements was largely cumulative (p. 326).

Finally, the same situation obtained in *Fuhrman v. Reading Company*, 439 F.2d 10 (3 Cir. 1971) (Pet. p. 10). There, the defendant complained that the medical experts consulted by the plaintiff for purposes of testimony should not have been permitted to express an opinion based upon a history furnished by the plaintiff. In ruling that the opinion was admissible, the Court said (p. 15):

> "* * * Since the plaintiff himself testified to this very same material during the trial and was available for cross-examination, it is difficult to understand the position of the defense. The plaintiff's history to which he testified in court was no longer hearsay and the Trial Judge properly ruled that the medical experts could express an opinion based on this factual data."

At the risk of repetition, we desire to emphasize that in the case at bar the rejected medical opinions were not, in any instance, supported by the sworn testimony of the individual claimants.

IV. The Court of Appeals correctly vacated awards for loss of earning capacity in the personal injury cases because the record contained no evidence that claimants' earning capacity had been reduced, and, in fact, the record demonstrated that claimants increased their earnings in the years following the collision.

Petitioners complain that the Court below eliminated the element of loss of earning capacity (Pet. p. 10). The sound reason for the Court doing so is that, as the record demonstrates, the claimants' ability to earn has not only not

been diminished but, in some instances, has actually been increased. In that connection, the Court stated (Appendix K, pp. A205-206):

> "In addition, four claimants were awarded amounts for their loss of earning capacity. At the outset, we note that our previous opinion set forth specific guidelines for computing such loss. We stated that the first step is to establish the claimants' 'normal annual earning capacity.' Next, we stated that '* * * the claimant must establish the reduction, if any, in his earning capacity proximately resulting from the injury by showing the existence of some condition which demonstrably limits his opportunities for gainful activity' 436 F.2d at 1270. Again we find there are no findings by the Commissioners and further we find a lack of support in the Commissioners' report for findings. *In fact, the record provides evidence that the parties increased their earnings in the years following the incident. There is no evidence to support the contention that earnings would have increased to an even higher level but for the injuries.* Yet there were awards of $72,000; $36,000; $29,000; and $18,400.
>
> "We vacate the awards for the reason that they are unsupported by the evidence in the record. *Nowhere do we find evidence that any of these four claimants has had his earning capacity reduced as a proximate result of an injury arising out of the collision* * * *" (Emphasis supplied)

The arguments advanced in support of and against the issues raised in Point I of Reasons Relied on for Allowance of Writ highlight the reasons why the writ should be denied. The fact that this is a multiple claim proceeding does not give it additional stature and, stripped to its

essentials, it involves nothing more than a discussion of facts and the admissibility of evidence. Since there is no conflict between Circuits which might warrant a review by this Court, it is time, we respectfully urge, for this protracted litigation to be brought to a close.

V. Claimants' purported economic analysis relative to lost earnings in the death cases has no basis in law or fact, and, contrary to the statement of Petitioners, the pecuniary losses in the death cases were computed by using earnings, an annual growth factor and fringe benefits determined pursuant to the relevant collective bargaining agreements.

Contrary to Petitioners' assertions, the Court below, in determining the loss of future earning capacity in the two death claims, did carefully and accurately consider the collective bargaining agreements and fringe benefits.

At one point, Petitioners claim that "In determining the loss of future earning capacity, the Court below completely ignored the collective bargaining agreements under which the men worked, but instead, took the average earnings for the four years prior to the collision." However, the Petitioners then reveal the inaccuracy of this claim by noting that "The Court below stated that a review of the collective bargaining agreements showed an annual increase in the past years of 1½%." (Pet. p. 12, footnote 9).

The Court of Appeals in its first opinion concerning compensatory damages stated:

> "The basic factor of the lost earning capacity is the monetary wage which the decedent would have earned had he lived, but earning capacity may also include

the value of those fringe benefits which would inure to the benefit of the decedent's family had he lived." (Appendix F, pp. A121-A122)

The Court went on to point out that "The Commissioners then added to the total of lost earnings so computed a factor ranging from 15% to 40% of such earnings for lost fringe benefits * * *" (Appendix F, p. A122). The Court continued its consideration of the fringe benefits factor by which the Commissioners increased their awards for lost earning capacity by 15% to 40%, stating:

"Insofar as the size of the awards is concerned, the record shows that in some cases there is little variation in the parties' evaluations of the fringe benefit losses, and that in no cases are the Commissioners' awards beyond the range suggested by the parties' own evaluations." (Appendix F, pp. A125-A126)

As shown in the opinion of the Court, the claimants' percentage of fringe benefits to earning loss in the Fuhrman death claim was 16%, the shipowners' percentage was 11%, and the Commissioners' percentage was 15%. Similarly, in the Haske death claim the claimants' percentage was 22%, the shipowners' percentage was 10% and the Commissioner's percentage was 15% (Appendix F, p. A126, footnote 8). Rather than ignoring the collective bargaining agreements in its consideration of loss of future earnings, the Court below carefully analyzed the collective bargaining agreements, stating:

"However, in making the assumption, the Commissioners apparently ignored the documentary evidence in the record in the form of the collective bargaining agreements under which the decedents would have continued to have been employed had they lived." (Appendix F, p. A127)

In its second opinion on compensatory damages the Court below reexamined the principles concerning loss of future earnings, stating:

> "In recomputing the personal injury and death claims, earnings history was selected as the base for determining lost earnings or earning capacity. This of course would be subject to change if the individuals had employment prospects other than their employment at the time of their death or injury. The record does not contain evidence of such prospects and claimants have not suggested otherwise." (Appendix K, p. A194)

Petitioners' purported "analysis" of the collective bargaining agreements and the fringe benefits set forth in their Exhibits 1, 2 and 3 is so patently erroneous as to be rejected by the Commissioners and the District Court when the original awards were made for loss of earning capacity. It was properly rejected twice by the Court below.

Petitioners' argument in reference to Exhibits 1, 2 and 3 might be summarized as follows: Neither the decedents' nor the personal injury claimants' earnings or earning capacity should be computed by reference to actual earned income and, as clearly stated by the Court below in its first opinion (Appendix F, pp. A116-A117), "taking into account all available data relevant to wage adjustment," but rather should be determined by an "analysis" consisting of the unsubstantiated speculation of a non-witness. The Petitioners' argument is devoid of merit.

The first and most basic error in the Petitioners' "analysis" is that there exists no substantial, factual basis for the "analysis" as made. In Exhibit 1 of their Brief, Petitioners include seven possible sources of current income for seamen (wages, overtime, holiday pay, vacation

pay, bonuses, subsistences and annual service awards). To the extent that these sources result in pecuniary benefit to an employee, such benefit will be reflected in his aggregate annual earnings.

The remainder of Petitioners' "analysis" related to pension and welfare benefits. It is impossible to make any detailed response in this connection because the basis, factual and actuarial, upon which the "analysis" is developed is not in the record. However, we need not belabor this issue further because, as found by the Court below, acceptable percentage factors were developed based on the evidence in the record showing the relationship between earnings and fringe benefits and were used by the Commissioners and District Court in computing the present death awards.

Petitioners' "analysis" may be fairly characterized as fantasy. Under the Petitioners' computations, the total of Fuhrman's loss of earnings would be $778,505. Prior to his death, Fuhrman never earned more than $7,044 in any one year. Thus, it would take Fuhrman at least 110 years to earn the amount the Petitioners urge represents Fuhrman's loss of earnings. The foregoing remarks are equally applicable to the Haske death claim.

Petitioners claim, "In addition, the Court below also overlooked the future annual increases." (Pet. p. 13). This is false. The Commissioners, in their recomputation of the earning capacity losses in the death claims, stated:

> "In addition an annual wage increase of 1-1/2% from death date to judgment date is applied. For the period from the judgment date to the final year of the work life expectancy, after review of the evidence, the findings of personal productivity and economic growth

were made in each individual death claim as indicated in the recomputations." (Appendix H, p. A142)

The Court below in its second opinion on compensatory damages agreed with the Commissioners' determinations in this aspect of the death claims, stating:

"We can only conclude that the prior opinion clearly sets out the procedure to be followed by the District Court in determining the future earnings loss of both the death and the personal injury claims, and that these awards are not clearly erroneous." (Appendix K, p. A195)

Contrary to Petitioners' assertions that the testimony of their witness on the rate of wage increases was "uncontradicted" and unchallenged by United States Steel Corporation, this testimony was so thoroughly refuted that the Court below, in referring to the Petitioners' position on the rate of annual wage increase, stated in its second opinion:

"Claimants have persistently argued the bargaining agreement reflects a 4-5% increase. This was rejected previously and we must reject it again as unsupported by the agreement." (Appendix K, p. A195)

The Court below carefully considered all relevant factors in determining the loss of future earning capacity in the death claims as well as in the personal injury claims and gave full measure to the collective bargaining agreements and the fringe benefit factors. It, in fact, increased the awards in the two death claims over those recomputed by the Commissioners and the District Court as conceded by the Petitioners (Pet. p. 6).

These precise issues have already been before this Court in connection with claimants' earlier Petition for

Writ of Certiorari and Petition for Rehearing, both of which were denied. (Petition for Writ of Certiorari, No. 1475, October Term 1970, pp. 22-28; Petition for Rehearing, No. 1475, October Term 1970, p. 5). Petitioners' contentions thus represent no more than a stale rehash of arguments which have previously been considered by this Court.

CONCLUSION

The arguments advanced by the Petitioners have been twice rejected by the Court below in well considered opinions and highlight the reasons why the writ should be denied. There is nothing inconsistent in the opinion of the Court below with any of the decisions cited by the Petitioners. Petitioners' difficulty in the Court below resulted not from that Court adopting rules contrary to or in conflict with those of the other Circuits, but from the fact that it scrupulously observed the rules and principles in concordance with those of other Circuits. Petitioners' difficulties with well established rules of evidence result from a complete absence of any credible evidence in the record to support any of the Petitioners' assertions and these difficulties do not involve constitutional problems or problems of great national interest.

Stripped to its essential elements, this case involves nothing more than a discussion of the balancing of facts and the admissibility of evidence. There is no conflict herein between Circuits nor with decisions of this Court.

We respectfully urge that the Petition be denied and that this endless litigation be terminated.

Respectfully submitted,

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